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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

C. E. NIEHOFF & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause on March 28, 1957.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 11-21) is reported at 241 F. 2d 37.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1957 (Appendix B, *infra*, pp. 22-23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals upheld the Federal Trade Commission's determination that respondent has discrimi-

nated in price between different purchasers of its products in violation of Section 2(a) of the Clayton Act, and it affirmed the prohibitions of the Commission's cease and desist order. The court, however, modified the order by substituting for the provision that it take effect "forthwith" a provision that it take effect at such time in the future as the court "may direct, *sua sponte* or upon motion of the Federal Trade Commission."

The question presented is whether the power of judicial review conferred by Section 11 of the Clayton Act authorizes the reviewing court to postpone the operative date of a Commission order adjudicated to be valid, for the declared purpose of rendering the order a nullity until like orders have been entered against respondent's "competitors."

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. * * *
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price * * *, the burden of rebut-

ting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * *: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *.

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. 21, provides in part:

That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the commission * * * shall be of the opinion that any of the provisions of said sections have been or are being vio-

lated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *

* * * * *

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, * * *.

STATEMENT

Respondent sells automotive replacement parts to jobbers on a nationwide basis, and about 90% of its sales are classified as "ignition line" sales. It sells at list prices but grants discounts ranging from 1% to 17%, which are based upon the dollar volume of the particular customer's purchases during the preceding year. The Commission found that the business of jobbers of automotive parts is highly competitive, and that there is reasonable probability that the effect of the varying net prices at which respondent sells will be to injure or destroy competition among its customers. The court of appeals held that the Commission's findings had ade-

quate evidentiary support, and that its order properly implemented the prohibitions of Section 2(a) of the Clayton Act (*infra*, p. 17).

The court also stated that respondent Niehoff has 19 competitors in its ignition line business, that Commission complaints or orders are pending against only three of these competitors, and that the court was "persuaded" by respondent's contention that its "business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors" (*infra*, p. 18). The court believed that its review of Commission orders under Section 11 of the Act is an exercise of original rather than appellate jurisdiction, and that it had the same freedom to grant or withhold relief as a court of equity of original jurisdiction (*infra*, p. 19). The court thereupon decided to modify the Commission's order by eliminating the requirement that respondent "forthwith" cease and desist from selling at discriminatory prices, and substituting the provision that the cease and desist order take effect at such later time as the court "may direct" (*infra*, p. 20). The court explained the purpose and basis of its action as follows (*ibid.*):

> We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors.

REASONS FOR GRANTING THE WRIT

In *Moog Industries, Inc.* v. *Federal Trade Commission*, No. 750, this Term, this Court on March 25, 1957, granted the petition for writ of certiorari, limited to Question 4 presented by the petition, which reads as follows:

> Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction, until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its orignial equitable jurisdiction to protect the rights of petitioner.

In the *Moog* case the Government did not oppose review of the issues embraced in Question 4, although it believed that those issues had been correctly decided by the Eighth Circuit, because of the conflict with the decision of the Seventh Circuit in the instant case. Apart from the need for resolving the conflict between

the two circuits,[1] review is warranted because of the obvious substantial importance of the issues and because the holding below departs from principles settled by this Court in a number of cases. In essence, the court below has held that a practice adjudicated to be illegal may be continued until determination of the legality of like practices by the respondent's competitors. As the Commission's opinion states, this would mean that "Commission orders would be forever pending and unlawful practices rarely, if ever, corrected" (R. 1026).

The decision below would, in effect, create a new statutory defense to price discrimination—absence of completed administrative proceedings against competitors. Section 2 of the Clayton Act, however, both defines the limits of the prohibition and specifies what may be set up as a defense.[2]

This Court in an analogous situation has refused to sanction, as a defense to an administrative order, that like orders had not been issued against competitors. *United States* v. *Wabash Railroad Co.*, 321 U.S. 403, sustained the validity of an order of the Interstate Commerce Commission cancelling certain railroad tariff supplements which were found to constitute an unlawful preference to a shipper, notwithstanding the fact

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[1] See also *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, pending on petition for a writ of certiorari filed April 10, 1957 (No. 900, this Term), where a different panel of the Seventh Circuit refused to modify the Commission order in the same manner as in this case.

[2] Price differentials which make "only due allowance" for cost differences resulting from differing methods of delivery or quantities of goods sold are legalized by the first proviso to Section 2(a), and the proviso to Section 2(b) permits as an affirmative defense that the seller's lower price "was made in good faith to meet an equally low price of a competitor".

that the Commission had not issued orders prohibiting like preferences to competitors of the shipper. See 321 U.S. at 406. The Court said that suppression of the statutory violation would be "practically impossible if the Commission were required to suppress all simultaneously or none", and that the Commission's duty to enforce the law "would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all." 321 U.S. at 414.

It is no defense to a charge of violation of Section 5 of the Federal Trade Commission Act that others employ the same unfair method of competition. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492, 494; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304, 308-309, 312-313. If this is not a defense to a cease and desist order effective on issuance, we submit that it equally is not a ground for postponing, by court decree, the effective date of an issued order.

The Federal Trade Commission, not the reviewing court, is initially to determine what relief is appropriate and necessary in order to put an end to a violation of law found by the Commission, and judicial review is limited to ascertaining whether the Commission has made "an allowable judgment in its choice of the remedy". This rule applies to proceedings under both Section 2(a) of the Clayton Act (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473) and Section 5 of the Trade Commission Act (*Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-612). See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-429. Determination of when the ordered remedy shall take effect is, we submit, an important

element of determining the requisite relief and is "within the province of the Commission rather than the courts". *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429, 432 (C.A. 4).

Judge Finnegan, in dissenting from the decision below, said (*infra*, p. 21):

> Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

The decision below is an open invitation to inject into the administrative proceedings under Section 2(a) collateral issues as to who are substantial competitors of the respondent, the extent to which the pricing practices of these competitors parallel those of the respondent, and the status of proceedings against the competitors. At present, Section 2(a) proceedings usually are

long drawn out and costly, and interjection of such additional issues would further prolong and complicate them. Furthermore, the decision below would be a precedent for injecting like collateral issues in proceedings under the Federal Trade Commission Act and other sections of the Clayton Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

APRIL 1957.

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

January 9, 1957

Before Major, Finnegan and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2 (a) of the amended Clayton Act.[1]

The complaint charges that Niehoff, in its nationwide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quan-

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receive the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *." 15 U. S. C. A. § 13.

tity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and distribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory and in violation of section 2 (a) * * *"; that "* * * the differentials in price were not justified by differences in cost under the cost proviso of section 2 (a)" (except in a minor particular which the commission on review set aside); and that "* * * the discrimina-

tions were not justified under the 'good faith' proviso of section 2 (b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications: [1a]

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
$12,000 and over	[4] 7

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy, or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the

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known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2 (a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the meaning of the good faith proviso of section 2.(b) of the Act.[5] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet

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[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U. S. C. A. § 13 (b).

any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2 (b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[6] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

II. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B.*, *supra*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the tradi-

[6] No. 11494 (C. C. A. 7) decided 12-14-56.
[7] No. 11500 (C. C. A. 7) decided 12-14-56.
[8] 5 U. S. C. A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474, 488.

tional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order

[9] Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

[10] 15 U. S. C. A. § 21.

requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act [11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held [12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon

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[11] 15 U. S. C. A. § 21.

[12] *Natural Gas Pipeline Co. v. Federal Power Commission*, 128 F. 2d 481, 484.

Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

ORDER, AS MODIFIED, AFFIRMED.

FINNEGAN, *Circuit Judge*. Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission * * * as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21 (1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its

opinion (T. R. 1027-1028) the Commission stated, *inter alia:* "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here * * * The lawfulness or unlawfulness of its competitors' prices * * * are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.

APPENDIX B

Final Decree

C. E. Niehoff & Co., petitioner herein, having filed in this Court on July 22, 1955, its petition to review and set aside an order to cease and desist issued on May 17, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of C. E. Niehoff & Co., F.T.C. Docket No. 5768"; and the cause having been heard by the Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, modifying said order to cease and desist and affirming said order as modified; and this Court having thereafter on February 21, 1957, denied respondent's petition for rehearing and petition for rehearing en banc:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that said order to cease and desist is modified to read as follows:

> It Is Ordered that respondent C. E. Niehoff & Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from discriminating, directly or indirectly, in the price of said automotive products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers compete, in fact, in the resale of said products.
>
> It is Further Ordered that this cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the

Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order of the respondent Federal Trade Commission, as hereby modified, is affirmed.

By the Court.

(S.) J. EARL MAJOR,

(S.) ELMER J. SCHNACKENBERG,

United States Circuit Judges.

Dated: March 28, 1957.

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